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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,
v.
QUINCY CABLE TV, INC., *et al.*,
Respondents.

BRIEF AMICUS CURIAE OF THE COUNCIL FOR UHF BROADCASTING IN SUPPORT OF GRANT OF CERTIORARI

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 2

STATEMENT OF POSITION 2

ARGUMENT 3

I. THE DECISION SHOULD BE REVIEWED BECAUSE IT THREATENS TO STIFLE NEW AND EXISTING DIVERSITY OF EXPRESSION IN THE COUNTRY'S MOST INFLUENTIAL MEDIUM 3

II. THE COURT OF APPEALS IMPROPERLY INTERPRETED THE CRITICAL FIRST AMENDMENT STANDARDS TO BE APPLIED HERE AND IMPROPERLY USURPED THE AGENCY'S FUNCTIONS OF MAKING FACTUAL FINDINGS AND TAILORING APPROPRIATE SOLUTIONS TO COMPLEX REGULATORY PROBLEMS 5

A. The Commission's Must-Carry Rules Are Supported By An Adequate Factual Basis and Are Not Unduly Broad 6

B. The Court of Appeals Made Factual Findings Far Beyond Its Proper Role 7

C. The Court's Order Vacating the Rules Constituted an Improper Overreaching of Appellate Powers 8

CONCLUSION 9

TABLE OF AUTHORITIES

CASES: Page

Abrams v. *United States*, 250 U.S. 616 (1919) 5

Associated Press v. *United States*, 326 U.S. 1 (1945) .. 4

New York Times v. *Sullivan*, 376 U.S. 254 (1964) 4

TV 9, Inc. v. *FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) 4

United States v. *O'Brien*, 391 U.S. 367 ..... 4, 5, 6

STATUTES:

All-Channel Receiver Act, Pub. L. No. 87-529, 76 Stat. 150, 47 U.S.C. §§ 303(s) and 330 5

FCC RELEASES AND ORDERS:

FCC News Releases #5293 (July 22, 1982) and #6999 (September 12, 1985) 3

FCC Public Notice 3723 (April 19, 1985) 4

Inquiry Into the Economic Relationship Between Broadcasting and Cable Television, 71 F.C.C. 2d 632 (1979) 6

Report and Order, 21 F.C.C.2d 245 (1970) 5

LEGISLATIVE HISTORY

H. Rep. No. 1559, 87th Cong., 2d Sess. 3 (1962) 5

S. Rep. N. 1526, 87th Cong., 2d Sess. 2-3 (1962) 5

MISCELLANEOUS

Television and Cable Factbook, 1985 Edition, No. 53, "Handy Pocket Directory of Television Stations in Operation 1985" 4

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BRIEF AMICUS CURIAE OF THE COUNCIL FOR UHF BROADCASTING IN SUPPORT OF GRANT OF CERTIORARI

The Council for UHF Broadcasting (CUB) submits this brief *amicus curiae* in support of the Joint Petition for Certiorari pursuant to Supreme Court Rule 36.1 with consent of other parties. The decision of the court below has particular importance for television broadcasters using UHF channels (channels 14-69). CUB strongly urges the Court to grant certiorari so that important constitutional issues can be fully aired and serious damage to the public's service from UHF television stations denied access to cable-served homes can be avoided.

INTEREST OF THE AMICUS CURIAE

CUB is a coalition of commercial and public television associations and individual broadcasters dedicated to achieving the goal of comparability of UHF broadcasting to VHF broadcasting.[1] Growth of UHF broadcasting promotes several important national policies simultaneously: it provides an opportunity for new entry and additional competition in television; it guarantees a multiplicity of diverse voices and perspectives in free over-the-air broadcasting; it permits more programming of interest to smaller and more specialized audience groups; and it gives women and members of minority groups increased opportunities for participation and ownership in the television broadcast industry.

CUB has a vital interest in all matters affecting UHF broadcasting. As is more fully described below, the D.C. Circuit's decision voiding the must-carry regulations will have a disproportionate, adverse impact on UHF broadcasters because (1) it is likely that more UHF stations will be denied carriage rights than VHF stations as a result of the decision; and (2) UHF stations depend on cable carriage for acceptable reception quality to a greater extent than VHF broadcasters.

STATEMENT OF POSITION

CUB supports the Joint Petition for Writ of Certiorari because important constitutional issues were incorrectly

[1]CUB is a coalition including the Association of Independent Television Stations, the Association of Maximum Service Telecasters, the Corporation for Public Broadcasting, the National Association of Broadcasters, and the National Association of Public Television Stations, all of which, with the exception of the Corporation for Public Broadcasting and the National Association of Public Television Stations, were petitioners for certiorari. The National Association of Public Television Stations filed a brief supporting the grant of certiorari as a respondent pursuant to Supreme Court Rule 19.6.

decided by the court below. CUB hereby incorporates by reference petitioners' Questions Presented, Statement of the Case, and Reasons for Granting the Writ. In addition, CUB submits the following reasons also supporting grant of the writ.

ARGUMENT

I. The Decision Should Be Reviewed Because It Threatens To Stifle New And Existing Diversity Of Expression In The Country's Most Influential Medium.

The Court of Appeals assumed that one "objective," as well as clear "byproduct," of the must-carry rules was "to protect an established industry [over-the-air television] from the encroachment of an upstart young competitor [the cable industry]. . . ." Petitioners' Appendix at 10a (hereinafter "Pet. A."). But in the case of the must-carry rules, UHF television is the "upstart young competitor" whose interests the rules principally were designed to protect because it is in the UHF television band that minorities and women, public television stations, and other sources of new and diverse viewpoints are emerging. The Court of Appeals' decision in *Quincy* not only shuts the door on future "upstart young competitors" but pulls the rug out from those who have launched UHF stations in the past and who, with the must-carry rules vacated, cannot survive or can do so only by reducing their public service programming.

A few statistics vividly demonstrate that UHF has been the vehicle for greater diversity and additional competition in the over-the-air television industry and can be expected to continue in this role in the future. Since July 1, 1982, 148 new stations have gone on the air; 108, or 73%, have been UHF. Of the 24 educational stations that have begun operations since 1982, 75% have been UHF.[2] At the present time

[2]*See* FCC News Releases #5293 (July 22, 1982), and #6999 (September 12, 1985).

87% of the country's independent stations (those not affiliated with ABC, CBS or NBC) are UHF, and 62% of the country's educational stations are UHF.[3] Commission records do not facilitate a quantitative analysis of minority ownership of television stations. But since the landmark decision in *TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974), recognizing the desirability of minority preferences in licensing, successful applicants for new television stations have often had significant minority ownership and significant minority participation in management. These trends will continue in the future since, of the television allotments remaining vacant in December 1984, 54 were VHF and 462 were UHF.[4]

The must-carry principle was designed and for 20 years retained to assure the public's access to these stations, both for that nearly 45 percent of the public that receives its television programming via cable systems and for the remainder who continue to depend on free over-the-air broadcasting. The Court of Appeals admitted that such a policy may be sufficiently "important or substantial" to justify the rules under the First Amendment. Pet. A., p. 42a, quoting *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). In addition, by preserving access to UHF and other local stations for the cabled public, the must-carry rules affirmatively serve First Amendment policies. This Court has held that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); see also *New York Times* v. *Sullivan*, 376 U.S.

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[3]*Television and Cable Factbook*, 1985 Edition, No. 53, "Handy Pocket Directory of Television Stations in Operation 1985."

[4]FCC Public Notice 3723 (April 19, 1985).

254, 270 (1964); *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Since cable systems are almost all *de facto* monopolies, and the must-carry rules prevent exercise of that monopoly power to limit access to an important conduit for free expression, this principle provides strong support for the must-carry rules.

Moreover, Congress itself has repeatedly recognized the importance of putting UHF on a comparable footing with VHF because it would serve the national policy objectives of providing for more diversity and competition in this country's most influential medium of ideas and viewpoints.[5]

II. The Court of Appeals Improperly Interpreted The Critical First Amendment Standards To Be Applied Here And Improperly Usurped The Agency's Functions Of Making Factual Findings And Tailoring Appropriate Solutions To Complex Regulatory Problems.

In this important First Amendment case the Supreme Court should exercise its oversight function to rein in the overreaching engaged in here. Otherwise, the Court of Appeals' decision could lead other lower courts seriously to misapply the broadly applicable First Amendment standards set forth by this Court in *O'Brien*; could invite other appellate courts to find facts in situations where this function would be better left to an expert agency; and could set a precedent for appellate courts to fashion regulatory relief that in the first instance should be the province of the administrative agency. While the petition for certiorari develops these points comprehensively, they are particularly

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[5] *See* All Channel Receiver Act, Pub. L. No. 87-529, 76 Stat. 150 (codified at 47 U.S.C. § 303(s) and § 330); S.Rep. No. 1526, 87th Cong., 2d Sess. 2-3 (1962); H.Rep. No. 1559, 87th Cong., 2d Sess. 3 (1962); *Report and Order*, 21 F.C.C.2d 245, 247 (1970).

telling when analyzed from the perspective of UHF television.

A. The Commission's Must-Carry Rules Are Supported By An Adequate Factual Basis and Are Not Unduly Broad.

The Court of Appeals held that (1) the Commission had not proved that non-carriage would hurt local broadcasting service and (2) the rules were overbroad for the purpose of protecting the public's legitimate interest in this local service.

If proof of injury to the public's local service is what the Court of Appeals wanted, it should have remanded the case to the Commission for this purpose, leaving the present rules in effect during the interim. But in fact the Commission had on numerous occasions reached the factual conclusion that the must-carry rules were necessary to assure the public's access particularly to newer and weaker UHF stations.[6] Moreover, it seems wholly defensible for the Commission to have concluded that if a struggling new UHF station — perhaps minority owned, perhaps a public broadcaster — cannot obtain access to the 40 percent, 50 percent, or 80 percent of the homes in its service area that are hooked up to cable, its prospects for survival and, accordingly, for rendering service to the public are substantially impaired or even eliminated. Indeed, this proposition seems so self-evident that the obligation to submit proof should have rested on those who sought to overturn the rules.

Also deficient is the Court of Appeals' treatment of the second prong of the *O'Brien* test — the question of the

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[6]The Commission has explicitly found that UHF stations would be at a significant competitive disadvantage vis-a-vis VHF stations without the benefit of must-carry. *See, e.g.*, Inquiry Into the Economic Relationship Between Broadcasting and Cable Television, 71 F.C.C.2d 632, 713 (1979).

"congruence" between the Commission's means, the must-carry rules, and the end, preserving the public's access to local service. The Court of Appeals suggested that must-carry rules might properly protect stations that carry substantial amounts of local programming (Pet. A. at 54a), and elsewhere that they might properly protect local stations whose economic well-being is most vulnerable. (Pet. A. at 56a). Since the amount of local programming a station broadcasts often reflects its economic strength, a rule assuring carriage of only those stations that currently carry substantial local programming would fail to protect many weaker stations which over time might nevertheless grow in strength and thereby improve their public service programming in quality and quantity. Moreover, a must-carry rule which distinguishes between stations on the basis of program content might raise serious constitutional problems of its own. In short, there may be sound reasons for the Commission not to develop rules that pick and choose which local stations cable systems must carry, but instead to have determined that if cable systems carry any broadcast station under the Commission's jurisdiction,[7] they must carry all local stations.

The problem of cable systems with limited channel capacity (though a problem within the cable systems' ability to remedy) and the problem of must-carry local signals that largely duplicate each other may call for fine tuning of the Commission's rules. But if waivers are not adequate for this purpose, these issues should have been remanded for the Commission to resolve in an appropriate rulemaking.

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[7]If a particular cable operator chooses to carry no broadcast stations at all (a rare occurrence), the Commission has or should have no jurisdiction to impose mandatory carriage rights.

B. The Court of Appeals Made Factual Findings Far Beyond Its Proper Role.

The Court of Appeals made critical and erroneous factual assumptions on questions that should have been left to the agency. For example:

(1) The Court of Appeals assumed that the rules benefitted entrenched broadcasters against struggling cable entrepreneurs, while in fact they put struggling UHF entrepreneurs who promise in the long run to add much program diversity on a more competitive footing with their usually better established VHF counterparts.

(2) The Court of Appeals failed to recognize or give proper weight to the fact that cable systems are in fact monopolies that have bottleneck power over which television stations are received in cable homes, and that this power would often be used to preclude or impair the access of weaker UHF stations into large proportions of their service areas that are cabled.

(3) The Court of Appeals' discussion (Pet. A. at pp. 48a-49a, n. 48) of how the cable public does have access to local television signals not carried by cable systems contradicts the expert agency's factual findings. UHF broadcasters know that the difference between cable carriage of their signals and reliance on A/B switches can mean the difference between survival and the termination of their local service.

(4) Although not involving a factual finding of the same kind, the FCC would also far better understand the relationship between the must-carry rules and the federal copyright scheme for cable retransmissions of broadcast programming which the Court of Appeals

wrongly dismissed in a brief footnote. Pet. A., pp. 41a-42a, n. 42.

C. The Court's Order Vacating the Rules Constituted an Improper Overreaching of Appellate Powers.

The various flaws of the Court of Appeals' approach to this case led it to overreach in vacating the rules rather than sending them back for the Commission to review and revise as appropriate in light of First Amendment concerns. As matters now stand, the Commission has both found it "inconceivable" that it can fashion must-carry rules that would meet the standards of the Court of Appeals' decision[8] and declared that the decision creates a serious "imbalance" because of the cable compulsory license provisions of the Copyright Act.[9] On certiorari, this Court can ensure that the carriage rights upon which UHF broadcasters depend — and the established national communications policies which the must-carry rules promote — are not erased permanently on the basis of misapplication of the law and the improper, overreaching factfinding of the lower court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[8]Pet. A. at 138a.

[9]*Id.*